

A READING OF THE 2010 DECLARATION OF A STATE OF ALARM IN SPAIN. A THRESHOLD OF INDISTINCTION BETWEEN THE INSIDE AND THE OUTSIDE OF THE LAW

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ABSTRACT

A Schmittian idea underpins democratic constitutions: when chaos threatens order, the democratic constitutions allow the suspension of the law for its preservation. That is, constitutions envisage the possibility of suspending the rights of some individuals in order to safeguard the normal life —whatever may be understood by «normality»— of the State. The aim of this paper is to examine what, in our opinion, constitutes a recent example of such a phenomenon in contemporary Spain: the illegal strike carried out by the Spanish air traffic controllers in December 2010 and the state of alarm that the Spanish government declared as a response to it. In our opinion, this case illustrates the complex ways in which the law is at work even when it seems it is not. By exploring this phenomenon we will also show three of the collateral effects of democracy.

Keywords: Giorgio Agamben, Jacques Derrida, state of alarm, state of exception, strike of Spanish air traffic controllers.

RESUM

Les constitucions democràtiques descansen sobre una idea característica de Carl Schmitt: quan l'ordre es troba amenaçat pel caos, les constitucions democràtiques permeten que se suspengui la llei per tal que la constitució i l'ordre siguin preservats. És a dir, les constitucions inclouen la possibilitat de suspendre els drets d'alguns individus per tal de salva-

guardar la vida normal —sigui el que sigui el que s'entengui per «normalitat»—de l'Estat. L'objectiu d'aquest article és examinar el que ens sembla que constitueix un exemple recent d'aquest fenomen dins de l'Estat espanyol: la vaga il·legal que dugueren a terme els controladors aeris el desembre del 2010 i l'estat d'alarma que, com a reacció, va declarar el govern espanyol. Proposem que aquest cas il·lustra la complexitat de la manera com la llei segueix vigent fins i tot quan ha estat posada en suspensió. En explorar aquest fenomen, també mostrarem tres dels efectes col·laterals de la democràcia.

Paraules clau: Giorgio Agamben, Jacques Derrida, estat d'excepció, vaga dels controladors aeris espanyols.

Introduction

A clearly Schmittian idea underpins democratic constitutions: when chaos threatens order, the democratic constitutions allow the suspension of the law for its preservation. That is, constitutions envisage the possibility of a state of exception: suspending the rights of some individuals in order to safeguard the normal life —whatever may be understood by «normality»— of the State. In other words, a seemingly fair end justifies a questionable means, but a means that is absolutely legal, which is to say that belongs to the juridical order. For Schmitt, the possibility of suspending the laws is a powerful and necessary instrument to prevent chaos from unleashing.¹

This mechanism —which, according to Carl Schmitt, is at work only during a state of exception— has actually become one of the foundations of current politics. September 11th was a crucial turning point in this regard. It unleashed the so-called war on terror, which rests upon the suspension of the rights of some particular individuals for the sake of society in general. Giorgio Agamben, the well-known Italian philosopher, goes so far as to claim that we now live in a permanent state of exception: it is impossible to distinguish between the inside and the outside of the law.²

1. See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Massachusetts: MIT, 1985; 1922¹). Carl Schmitt argues that the function of the suspension of some laws typical of a state of exception —that is, when a complex and threatening political, social or economical conjunction is at stake— is not to lead to chaos or anarchism, but by contrast, to get back to normality, therefore preserving the withstanding legal order. In exceptional states, he claims, some laws must be suspended because they prove ineffective for reestablishing the normal course of things. However, this suspension of the law, as long as it aims at reinforcing legality, is inscribed within the juridical order (p. 6-7). In Schmitt's words, when the sovereign makes decisions within a state of exception, «[a]lthough he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety» (p. 7).

2. See G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford

The aim of this paper is to examine what, in our opinion, constitutes a recent example of such phenomenon in contemporary Spain: the illegal strike carried out by the Spanish air traffic controllers in December 2010 and the state of alarm that the Spanish government declared as a reaction to it. In our opinion, this case illustrates the complex ways in which the law is at work even when it seems as though it is not.

The article is divided into three parts. Section I presents the most relevant facts of the 2010 Spanish air traffic controllers' strike as well as its most significant antecedents. In Section II, the following question is posed: the air traffic controllers tried to oppose the law, but were their efforts successful? We will hold that they were not, nor could they be, since in trying to oppose the law, they still enforced another kind of law—they performed what Walter Benjamin (1921) called «mythic violence». Section III discusses the reaction of the Spanish government: the declaration of a state of alarm. We examine how the state of alarm, despite entailing the suspension of some laws and allowing some extraordinary behaviors, cannot be conceived of as outside of the law. Indeed, in both cases—the strike of the air traffic controllers, on the one hand, and the action of the government, on the other—we will see how, despite challenging current legality, all the reactions are inscribed within the realm of the law. The article concludes by underscoring the double-bind of this inescapability of the law, inherent in democracy: democracy protects citizens *by* rendering them vulnerable or, in other words, democracy protects itself from *exterior* threats by threatening its own *interior*.

I. The Strike and its Antecedents

It used to be said that the Spanish air traffic controllers earned what seemed a stratospheric salary: an average of 200,000 Euros per year.³ Furthermore, their working conditions were said to be exceedingly good. For instance, they were not allowed to work more than 1,200 hours per year, and this included designated periods of rest—during the day, they had to rest 33 % of the time; at

University Press, 1998; 1995¹). In *Homo Sacer* (1995), Giorgio Agamben examines a figure of the Roman Law—*homo sacer*—, who is simultaneously included by and excluded from the law because of the crimes he has committed. According to Agamben, such territory of indistinction between the inside and the outside of the law is not an anomaly of the past or of very exceptional situation—Auschwitz, to cite one instance. It instead constitutes a paradigm of the political space in Western politics. He labels it «a threshold of indistinction» (p. 18). Agamben further elaborates on this concept in the second chapter of *State of Exception* (2003), where he defines it as force-of-law, a notion that our paper deals with in section III. See G. Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005; 2003¹).

3. See note 5.

night, 50 %.⁴ Nevertheless, their productivity was the lowest in Europe, while their salary was the highest.⁵

By April 14th, 2010, the government issued a law⁶ changing their conditions and decreasing their salary. This brought about an ongoing confrontation between the controllers and the administration or AENA.⁷ The controllers hold that the new conditions were unbearable and they resorted, in vain, to all possible legal sources to avoid their implementation.

On November 28th, 2010, ten out of twenty-eight air traffic controllers from the Santiago de Compostela airport did not go to work arguing that they had already worked all the hours they are allowed to work within a year and they even pressed charges against AENA. As a result, the aerial space of Santiago de Compostela had to be closed. The action of these controllers encouraged a great deal of controllers from all over Spain, who threatened to do the same.

By December 3rd, a decree was issued by the cabinet meeting, according to which the controllers were supposed to work 1,750 hours, excluding, for instance, union leaves of absence, certain sick leaves, lactation leaves, exams leaves and absence for family bereavement.⁸ In response, about 80 % of the controllers stopped working. Thousands of flights were cancelled and the airports were collapsed. Finally, the Spanish aerial space was closed.

December 3rd was no ordinary day: because of a national holiday, it was the first day of a period of holidays that finished the 8th. During these holidays, hundreds of thousands of passengers —the government spoke of 600,000-700,000 people— were supposed to fly to and from Spanish airports. Financial

4. Furthermore, the air traffic and its management depended on the controllers. It was not until a specific law was issued on February 5th that it started relying on AENA.

5. Giovanni Bisignani (2010), General Director of International Air Transport Association (IATA) stated: «Spanish air traffic control is the biggest cost problem for European ATM. Spain's air traffic controllers are the least productive but the best paid amongst their European colleagues. Spanish air traffic controllers in 2010 earn an average salary of EUR 200,000 per year —50 % more than the European average. But their productivity is only a third of what UK controllers achieve. The room for improvement is huge!» See G. Bisignani, «Un lío europeo de 5.000 millones», *El País* (December 9th, 2010). Available from: http://elpais.com/diario/2010/12/09/espana/1291849208_850215.html.

6. See *Law 9/2010, April 14th, by way of which the aerial transit service supply is regulated, the obligations of the civil suppliers of mentioned services are established, and specific working conditions concerning the civil air traffic controllers are determined*.

7. AENA stands for Aeropuertos Españoles y Navegación Aérea, and is the company responsible for Spanish airports and air traffic. While it was state-owned at the time, a private company named «AENA aeropuertos» was created in 2011 to manage the public airports. See *Royal Decree-Law 13/2010, December 3rd, of liberalizing interventions in the fiscal and labor field to promote investment and employment creation*.

8. See again *Royal Decree-Law 13/2010*.

losses are estimated to be in the millions. It was a big crash for the Spanish economy, already extremely damaged and weak due to its enduring crisis.

The controllers were ordered to return to their jobs, but they refused. The following day, an extraordinary cabinet meeting agreed to declare a state of alarm.⁹ This meant that the controllers were under direct control of the head of the Air Staff from that moment on. Should they fail to obey these orders, they would be judged according to military code, in which infractions of the law are judged more severely. For instance, not showing up for work might be penalized with eight years of prison. In short, the controllers and the aerial space were militarized.

The controllers returned to their jobs and after a few hours traffic had gone back to normal, leaving huge economic losses and open proceedings against one out of five of the controllers.

II. Strikers Against the Law within the Law

This affair puts a wide range of issues on the table. We will only deal with two of them: the first one entails the action of the controllers; the second one has to do with the reaction of the government, namely, the declaration of a state of alarm. In both of them, we will see the complex inner workings of the law and the impossibility of escaping it.

When it comes to the action of the controllers, one of the main problems is its legitimacy. Without a doubt, their action was not legal, since they did not apply for a permission to go on strike —hence the appellative «undercover strike». Nevertheless, it is well-known that according to many theorists legality does not exhaust justice, that is to say, some actions may not be legal, but they may be just. Was this the case for the controllers?

On the one hand, a relevant sector of public opinion said that they were irresponsible and showed a lack of professionalism:¹⁰ they, a privileged and wealthy caste, collapsed the country, damaging the economy and preventing the humble classes from traveling for the holidays, because they wanted to earn even more money. The government criticism focused more on an act of «disobedience» that provoked a «crisis».¹¹ On the other hand, in their favor, it

9. Which had not been declared since the 1978 Constitution had been implemented. See *Royal Decree 1673/2010, December 4th, by way of which a state of alarm is declared, for the normalization of air traffic, an essential public service*.

10. See for instance J.M. González-Posada, «La huelga de los controladores aéreos», *El País* (December 7th, 2010).

11. José Luis Rodríguez Zapatero (2010), the Spanish President at the time, stated: «We are not dealing with a labor conflict, but with disobedience. Nobody, neither individually nor collectively, can take the totality of citizens as a hostage of their claims. The government will not

has to be said that they did not strike for an even better salary, but simply asked for just working conditions, that is, to be allowed the same leaves the rest of the workers are allowed to have and of the amount of working hours established in their contracts.¹² Moreover, they had already pursued all other possible legal means. To fight for fair working conditions can be illegal, but not unjust. Those, though few, who defended the action of the controllers, maintained that having a high income is not a crime and does not automatically denote a moral duty and responsibility to the citizens' economy and holidays that exceeds that of the rest of the workers. Therefore, their labour rights can be defended by the same means as other professionals.

It is not our purpose, though, to examine whether the action of the controllers was fair or not. What concerns us is that no matter if it was fair or not, and regardless of the above mentioned reactions against the controllers, they performed an illegal strike they *deemed* just.

The debate about the legitimacy or not of using illegal means to reach supposedly higher ends is certainly very old and ramified. Within contemporary Western politics, it acquires a relevant dimension in the 1920s through a debate between the conservatism of Carl Schmitt and the libertarian ideas of Walter Benjamin. Such debate is also articulated within the thought of some Jewish philosophers who turn to certain categories belonging to the messianic tradition when forging their own understanding of politics and ethics.¹³ While some of them—and Benjamin himself—hold that the law is an obstacle and thus should be thrown away, others, such as Franz Rosenzweig (1921),¹⁴ Em-

hesitate to use, without ignoring while respecting the requirements of proportionality, all the instruments of the juridical state to halt situations like the ones we experienced this weekend.» See J.L. Rodríguez Zapatero, Recorded transmission of the ordinary session of December 9th, 2010, in which the Government informs las Cortes about the *Royal Decree 1673/2010 issued on December 4th, by way of which the state of alarm is declared, for the normalization of air traffic, an essential public service*.

12. See for example, by E. Orgaz, «Adiós para siempre», December 8th, 2010, in <http://www.controladoresaereos.org/2010/12/08/adios-para-siempre>.

13. Their reliance on categories belonging to the messianic tradition must be understood as an attempt to counteract the modern rationality to which, at that moment, many assimilated bourgeois Jews were adhering to, following a libertarian utopia rooted in the Jewish tradition. This is why their actions have been defined as simultaneously «conservative and revolutionary». See R. Forster, *El exilio de la palabra* (Buenos Aires: EUDEBA, 1999).

14. According to Rosenzweig, the mythic order can be overcome by repairing the fragmented totality. On this point, Rosenzweig distances himself from Hegel, as he holds that totality cannot be achieved through the Hegelian dialectical process, but by hosting divine love and returning it to those around. But how can this love, that comes from another world and is infinite, be hosted in this finite world? The impact of such force is extremely dangerous, since it can annihilate this world. Rosenzweig puts particular emphasis on the idea that, in order to surpass the mythic order, this world is not to be destroyed in its totality, but will instead be redeemed. There

manuel Lévinas (1968; 1974)¹⁵ and Gershom Scholem (1971),¹⁶ hold that it is a powerful means for liberation and redemption.

Without a doubt, the terms and contexts of the Schmitt-Benjamin controversy and the debate concerning the divergent approaches to the political value of the messianic tradition differ significantly from the current context. However, Giorgio Agamben effectively recasts some of their key concepts in order to think about the current political scenario, and we believe that as long as the case we are dealing with belongs to the sort of phenomena Agamben focuses on, they can be useful in helping us to shed light on it.

At first glance it may seem that the violence inherent to this strike constitutes what Walter Benjamin referred to as «divine violence». In «Critique of Violence» (1921),¹⁷ Benjamin sustains that justice cannot be reached through law. According to him, just ends are thoroughly irreconcilable with means legally justified or, in other words, within the realm of law there is no room for justice. To clarify this point, he distinguishes between two kinds of violence: mythic and divine. While the first one creates, posits and preserves the law, the divine one destroys the law, eliminates the limits that law entails. This second one works for the sake of the living; the first one, by contrast, is designed to protect itself.¹⁸ The mythic violence, of Greek origin, leads to oppression and guilt; it is bloody and seeks the preservation of power. By contrast, divine vio-

must therefore be a channel that prevents the destructive effects of this love from being spread everywhere. For Rosenzweig, this channel is the law. As he discusses in the third part of his voluminous work, it is only through the law —through its fulfillment— that divine love can provide the coveted unity. See F. Rosenzweig, *The Star of Redemption* (Madison: The University of Wisconsin Press, 2005; 1921¹).

15. Emmanuel Lévinas further developed this point, particularly in *Otherwise than Being or Beyond Essence* (Dordrecht: Kluwer Academic Publishers, 1991; 1974¹) and in *Four Talmudic Readings* (see *Quatre lectures talmudiques* [Paris: Minuit, 1968]). According to Lévinas, moral law, the Talmud, is the tool that should help human beings to escape from the oppression of another law, namely the natural law. This is the central point that Lévinas takes from Rosenzweig: for the thinker of Lithuanian origin, the only way beings can oppose the law of Being is to adhere to the Talmudic law. Talmudic law is therefore to be regarded as an antinomic strategy that actually serves the law. A. Bielik-Robson, «Tarrying with the Apocalypse: the Wary Messianism of Rosenzweig and Lévinas», *Journal for Cultural Research*, vol. 13 (2009), p. 258.

16. According to Scholem (1971), law is to be understood as a lightning rod that channels divine love. Humanity can only be redeemed by divine love, and yet divine love, in turn, as the very powerful ray that it is, can destroy everything it touches in less than a second. This annihilating force therefore has to be channeled, and the law precisely constitutes this channel. See G. Scholem, *The Messianic Idea in Judaism and other Essays on Jewish Spirituality* (New York: Schocken Books, 1971).

17. W. Benjamin, «Critique of Violence», *Selected Writings, Vol. 1: 1913-1926* (Londres: Belknap Press of Harvard University Press, 1999; 1921¹).

18. *Ibid.*, p. 297.

lence, of Jewish origin, is emancipatory and culminates in freedom and justice. Life no longer needs to be regulated by laws.

It seems that the violence inherent to the air traffic controllers strike, as long as they opposed the law, was divine in the Benjaminian sense. However, appearances to the contrary notwithstanding, it should be considered mythic, because it did not really escape law. This point can be seen more clearly if we see the two kinds of strike that within the same text Benjamin associates, respectively, with the mythic and the divine violence.

On the one hand, Benjamin places the general political strike, which opposes a certain order of things, but not the state and the law as a whole. It does not seek the abolition of power, but it just wants power to switch from the hands of some privileged individuals to the hands of other individual who will become equally-privileged people. On the other hand, there is the general proletarian strike, which aims, in its anarchist vocation, at destroying the state and the law. According to Benjamin, the first kind of strike is oppressive, because, ultimately, the structure of the law is preserved, while this second one is emancipatory, as it entails the release from the power. In the general political strike, there is at work a mythic violence; in the proletarian one, on the contrary, a divine one. This digression is clearly connected to the thesis Carl Schmitt holds in *Political Theology I* (1922) concerning the state of exception,¹⁹ although the function Benjamin and Schmitt grant to the state of exception could not be further apart. Schmitt regards the states of exception as means to go back to normality, that is, to the mythic order. And he considers that if such states allow for something new, that is, if they imply a way out of the established order, they are a *failure*.²⁰ Benjamin, unlike Schmitt, claims that exiting the mythic law is precisely a *success* —and that this should be the function of any strike. And —could be added—, by extension, of any state of exception.

The air traffic controllers strike seems, then, mythic through and through in the Benjaminian sense: they did not intend to overthrow the law as a whole and reach a state of freedom in which laws were no longer needed and could be thrown away, but just a certain law. In spite of using a (slightly) illegal

19. C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, *op. cit.*

20. Agamben has attempted to demonstrate that Schmitt's *Political Theology I* (1922) is a reaction to Benjamin's «Critique of Violence» (1921). Agamben holds that Benjamin's eighth thesis (1940) on the philosophy of history, which states that exception has become the rule, must be considered an answer to *Political Theology I*. According to Agamben (2003), Benjamin's eighth thesis invalidates the role that the exception covers in Schmitt's reading. In his thesis, Benjamin warns that, once the exception has become the rule, the state machine no longer works and must be rejected. See the rigorous argumentation that Agamben provides in order to prove his thesis in G. Agamben, *State of Exception*, *op. cit.*, p. 52-57.

means—a strike without permission—their action was deeply legal, for it played the rules of the mythic, legal order.

Even if they had attempted to escape law, could have they managed? Is there any space beyond law? Is it possible to escape from it? Could there possibly be an outside of the law? How would it look like? Can law be deactivated?²¹ In short, is divine violence, in the Benjaminian sense, ever possible?

We hold this case illustrates it is not: even if they had tried, the structure of the law would not have permitted them to move beyond it. The legal frame would remain unaltered. All of the movements they could have carried out would still belong to a sphere inhabited by the law. To see this point, let's move on to the second issue that this case puts on the table, that is, the reaction of the Spanish government—namely, the declaration of a state of alarm.

III. The Double-bind of the State of Alarm

The Spanish Constitution envisages the possibility of three exceptional states, that is, three states in which certain laws and rights can be suspended for the preservation of the State: the state of alarm, the state of exception, and the state of siege. All three are regulated by the Organic Law 4/1981,²² which makes it clear there is a progression between them: the severity of the situation in which the third one is declared and the kind of measures it allows for are much more extreme and radical than in the second one, and far more than in the first one.

21. This is what Giorgio Agamben puts forward in several of his works, particularly in *State of Exception* (*op. cit.*, 2003), *The Time that Remains* (*The Time that Remains: A Comment on the Letter to the Romans* [Stanford: Stanford University Press, 2005; 2000¹]), «The Idea of Language» (*Potentialities: Collected Essays in Philosophy* [Stanford: Stanford University Press, 2005; 1999¹], p. 39-47) and «The Messiah and the Sovereign: The Problem of Law in Walter Benjamin» (*op. cit.*, p. 160-174). Agamben's texts often explicitly and heavily rely on Benjamin's work. Through a rigorous examination of some of his texts, and to an important extent an undeniable adherence to his political thesis, Agamben proposes an alternative model. Real politics, he claims, is not what takes place inside the juridical order, but occurs precisely when the law has been deactivated or profanated. The way of living that he proposes entails an abolition of all juridical property, as he claims that it is necessary to change our idea of the political. However, Agamben's position has met the strong opposition of scholars who argue that in his work it is unclear how the mythic state should be left behind to give way to the higher one Agamben refers to. How this change must be operated remains unclear. Siding with this position there is also who claims that the ideal state Agamben longs for—characterized by an absolute lack of difference—and can only be described as death. See, for instance, Johnson (D.E. Johnson, «As If the Time Were Now: Deconstructing Agamben», *South Atlantic Quarterly*, vol. 106, no. 2 [2007], p. 265-290) and Bielik-Robson (A. Bielik-Robson, «A Broken Constellation: Agamben's Theology between Tragedy and Messianism», *Telos: Religion and the Critique of Modernity*, no. 152 [2010], p. 103-126).

22. See *Organic Law 4/1981 on the state of alarm, exception and siege*.

According to this law (chapter II, article IV), a state of alarm can be declared in four situations:

- a) Catastrophes, public calamities or misfortunes, such as earthquakes, floods, urban and forest fires or major accidents.
- b) Health crises such as epidemics, and severe pollution situations.
- c) Stoppage of essential public services to the community, when what is stipulated in Articles 28.2 and 37.2 of the Constitution is not guaranteed, and in the event of some of the other circumstances or situations contained in this article.
- d) Situations of shortage of staples.

According to the decree of December 4th (Decree 1673/2010),²³ through which the state of alarm was declared for the first time since Spain implemented the current constitution (1978), the illegal strike of the air traffic controllers had unleashed situation *c*. As mentioned above, this situation is not sufficient to declare such an exceptional state, but still requires, at least, another one. The decree stated that situations *a* and *d* were also given at that moment. Consequently, the air traffic controllers were militarized, as it was considered the only way to recover normality.

This mechanism is certainly frightening. Normally, one knows he or she is protected by the law. Well, perhaps one is not exactly protected by it, but one is aware of the fact that if he follows it, nothing can happen to him and it cannot harm him. And this fact protects him. Law limits one's freedom, it is true, but also delimits a safe area. By contrast, in an exceptional state, one feels lost. At any moment, if the situation is considered catastrophic enough—and this is, ultimately, a subjective decision—the state can turn against him. The perverse point of this phenomenon is that the law is suspended, but is not abolished, because its force is still at work. Almost paradoxically, the state of exception inscribes itself, thus, within the juridical order.²⁴

Giorgio Agamben (1999)²⁵ sheds light on this phenomenon turning to a letter that Gershom Scholem, the well-known scholar of religion, wrote to

23. See *Royal Decree 1673/2010, December 4th, by way of which a state of alarm is declared, for the normalization of air traffic, an essential public service*.

24. According to Schmitt, since the exception «is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind» (*op. cit.*, p. 12). This is the case because the law is suspended for the preservation of power; it is a provisional measure that does not seek the abrogation of the law, but rather its strengthening in the long term. In Schmitt's words «the state suspends the law in the exception on the basis of its right of self-preservation» (p. 12).

25. See G. Agamben, «The Idea of Language», *op. cit.*

Walter Benjamin in 1934.²⁶ In it, Scholem describes the status of the law in Kafka's work as a *Geltung ohne Bedeutung*, a force without significance, which Agamben expresses as force-of-law. There is no longer any law at work, but the force of law remains. Agamben quotes Scholem's letter: «a stage in which revelation does not signify [*bedeuten*], yet still affirms itself by the fact that it is in force. Where the wealth of significance is gone and what appears, reduced, so to speak, to the zero point of its own content, still does not disappear.»²⁷

This structure is analogous to the linguistic phenomenon of the «zero phoneme» coined by Lotz and Jakobson that Jacques Derrida analyzes.²⁸ This notion refers to phonemes that do not mean anything and do not add any meaning to a given word, and were they to disappear from a certain word neither the pronunciation of the word nor its sense would be altered. In modern Catalan and Spanish, the letter *h* is a clear example. *H* is a skeleton without flesh, a signifier that does not refer to any signified in particular. However, as Jacques Derrida highlighted, the phoneme zero distinguishes itself from the absence of phoneme.²⁹ In this stage in which the signifier is reduced to its minimum expression one does not find nothingness, but rather an impulse or force that is not exhausted in any signified in particular. At the zero degree of meaning there is superabundance. And said superabundance makes the exactitude of sense, the precision of sense—in short, the univocity of meaning—just impossible.

This same sort of force is what is at stake in the *Geltung ohne Bedeutung* Scholem is concerned with. This force is at work but does not come into force or does not result in any law in particular. It is a mere force of law deprived of any concrete shape. It cannot be grasped, known or reached. It keeps its force, but there is no longer any identifiable law. Therefore, one cannot be *within* it—that is, one cannot fulfill or obey it—nor can one be *outside* of it. In other words, at a state of exception there is at stake a threshold of indistinction between the inside and the outside of the law.

What concerns us here is that this force disconnected from any concrete law, instead of meaning total freedom, becomes a terrible oppression. If there is no regulation, one is absolutely vulnerable; we are *exposed* to the force of law. Law haunts us, but we can neither stick to it nor break it, because its shape

26. See W. Benjamin; G. Scholem (ed.), *The Correspondence of Walter Benjamin and Gershom Scholem, 1932-1940* (New York: Schocken, 1989).

27. G. Agamben, «The Messiah and the Sovereign: The Problem of Law in Walter Benjamin», *op. cit.*

28. See J. Derrida, *L'écriture et la différence* (Paris: Seuil, 1979).

29. *Ibid.*, p. 425.

has vanished. One need only think of Auschwitz Concentration Camp or Guantánamo Bay Detention Camp.

It cannot be denied that this suspension of the law is designed to protect citizens in dangerous situations, but it is done through ambiguous means: rendering some citizens extremely vulnerable. For example: the declaration of a state of alarm, states article 11, allows for:

- Limiting the circulation of people and vehicles in certain times and places.
- Practicing temporary requisitions of all kind of goods and impose personal obligatory services.
- The transitory intervention and occupation of industries, factories, workshops, or establishments of any sort, except private residences, reporting it to the concerned Ministries.
- Necessary orders to guarantee the supply of the markets and the smooth running of services and centers of production affected by the section D of the fourth article.

Yet what we would like to highlight is that citizens are not only vulnerable during the explicitly declared states of exception, but always. This stems from the fact that the Constitution can be suspended at any moment (*a*), and its effects (*b*) as well as its duration (*c*) cannot be anticipated. In theory, this is not true, because the circumstances in which a state of alarm can be declared are clearly defined, as are its effects and its duration. However, a careful reading of this law brings to light that the decision of whether a situation is critical enough is ultimately subjective (*a*), as are the implications that a state of alarm has for the citizens (*b*) as well as its length (*c*).

Let's focus on the three mentioned facts one by one.

- a*) How is it decided whether a situation is critical enough? The following conclusion is drawn from the reading of said law: none of the four factors that can induce a state of alarm is clear-cut. When it comes to the first factor, how does one define what «catastrophes, public calamities or misfortunes» are? How are limits set between a «major accident» and an accident that does not warrant the declaration of a state of alarm?

Regarding the second factor that can induce a state of alarm, what is understood by «severe» pollution? Who sets the limit between what is severe and what is not? How can it be guaranteed that the politicians who declare the state of alarm are not saying the situation is «severe» because they have some personal, economic or political interests in the declaration of such a state? It has been claimed that the declaration of

the state of alarm was a strategy on the part of the Spanish government to divert the attention of the citizens away from some unpopular measures recently taken, and to reinforce its image. Actually, the popularity of the Spanish government increased drastically after militarising aerial space.

Yet even if this was not the case and the politicians had good intentions, how can we be sure that, without meaning to, they are not misusing the adjective «severe»; that they are not abusing it? And, finally, turning to the last of the situations, *d*, how can it be established what a basic product or staple is? Is it true that, as a result of the air traffic controllers' strike, there was a shortage of some basic products? It depends, of course, on where the threshold lies between what is basic and what is not.

- b) The implications of a state of alarm for citizens are not, actually, regulated, but depend on subjective criterion. As article 9 reads, «civil authorities of public administration of the territory affected by the declaration, as well as its workers, will be under the direct orders of the proper authority as far as it is necessary for the protection of people, goods and places».
- c) We would like to underline a third instance of subjectivity in the law that regulates the state of alarm, this time concerning its duration. According to article 6, 2, a state of alarm cannot exceed fifteen days, although «it can be extended by an authorization of the Chamber of deputies». This means that, in reality, the length of the state is not regulated.

In summary, the close reading of this law reveals that, among the seemingly objective vocabulary of the juridical sphere, there are plenty of words that are not objective at all. Consequently, in the end there is no static regulation. But this, while it avoids the oppression of a rigid, invariable law, provokes another kind of oppression, derived from the fact that a state of alarm can be declared at any moment. Even when we think we are governed by some concrete laws, we are not. In democracy, we are exposed to the overarching force-of-law at all times.

This can only mean something that Carl Schmitt already noticed: democracy and dictatorship belong to the same family.³⁰ Agamben, in *Homo*

30. It is true that in 1921, in a text entitled *On Dictatorship* (C. Schmitt, *La dictadura: Desde los comienzos del pensamiento moderno de la soberanía hasta la lucha de clases proletaria* [Madrid: Alianza, 2003; 1921'], forthcoming in English, by Polity Press, Cambridge), Schmitt had already dealt with the issue of the state of exception, but *only* in its relation to dictatorships. It was not until 1922's *Political Theology* that he examined the link between the state of

*Sacer*³¹ (1995) and in *State of Exception*³² (2003), picked up this thread again and brought it to a more radical conclusion, following Benjamin's eighth thesis of history:³³ the exception has become the rule; we live in a permanent state of exception. It is obvious that a dictator can do whatever he pleases, while, in democracy, thousands of laws regulate the action of the government. However, and this is the startling similarity between a democracy and a dictatorship, almost all of these laws can be suspended (although not by a person, but by a group of people). It is true that these people are the citizens' representatives, but citizens delegate their power to them, so their decisions do not necessarily coincide with their. From this perspective, all democratic laws would just be a cushion that softens the brutality of dictatorship. The possibility of suspending the law, that is, the fact that democracy is not based on a rigid structure, is, simultaneously, the major weakness and the major strength of democracy.

Final Remarks

Finally, we would like to point out how the conclusions we have drawn from our examination of the case of the air traffic controllers actually constitute three of the collateral effects of democracy.

In the first place, this case brings forth the *inescapability of the law*. This is what we have seen when looking at the controllers' actions—they opposed a law through a legal structure—and those of the government—it reacted to the controllers by essentially suspending the law, legally. We are exposed to the law at all times and we can only act through it. Within democracy, there is no outside of the law; there is no room for the divine violence Walter Benjamin longed for—the mythic law cannot be overcome. Absolute freedom and justice can thus never be reached.

The mechanics of this relation between law and justice is lucidly explored by Jacques Derrida in «Force of Law. The “Mystical Foundation of

the exception and *all* exercise of power, which encompasses all forms of government, and not only dictatorships. As the well-known first sentence of his *Political Theology* reads: «sovereign is he who decides on the exception» (p. 5). In affirming that the legal order rests upon a decision and not, as is often believed, upon a norm, Schmitt shows that democracy includes some elements of dictatorships. Most democrats have preferred to ignore this, supporting a supposed impersonality of democracy as a guarantee that the will of the sovereign will not be imposed on the rest of the individuals. These democrats do not realize, however, that even within democracy decision is unavoidable.

31. *Op. cit.*

32. *Op. cit.*

33. See W. Benjamin, «Theses on the Philosophy of History», *Illuminations* (New York: Schocken Books, 1986; 1940¹), p. 253-264.

Authority”» (1989-90).³⁴ According to Derrida, each law rests upon a previous law, creating a machinery in which each piece depends on another. The whole apparatus seeks justice, which seems to occupy the first position of such machinery, but justice can never be attained because, according to Derrida, justice constitutes the condition of possibility of the laws, and, as the mere *possibility* it is and will always be, it can never be reached nor grasped. That is to say, justice, as a mere possibility, lacks a particular shape and therefore can never be achieved. It is «unpresentable».³⁵

Yet it is undeniable —Derrida goes on to say— that many laws try to present themselves as *the law*, that is, as undeconstructable truths. In their endeavour to present themselves as self-evident they try to constitute themselves as justice. They try, in short, to usurp the space traditionally assigned to justice. But again this attempt is in vain since as long as justice lacks a concrete form laws cannot encompass it. In Benjaminian terms: the mythic order can never be surpassed. In short, the strike of the air traffic controllers teaches us that law cannot be overcome or done away with.

In contrast to Benjamin and Agamben, for Derrida this impossibility of reaching justice should not be regarded as a misfortune, but rather as a precious guarantee of an openness that avoids asphyxiation. But does the case examined in this paper show this resistance to asphyxiation? Yes and no. On the one hand, the way law is entangled with life makes individuals feel trapped in a limited space, and act within a pre-established territory from which they cannot escape. Yet on the other hand, as we have seen, this limitation delimits a fairly safe area. Moreover, the disappearance of the differences that support the law would generate a space much more unbearable. Reaching justice would imply the disappearance of the tension that creates and maintains differences. Distinctions would thus vanish, leading to a complete homogenization in which one's difference and particularities would simply not have room. In short: only that violence which aspires to the abolition of all hierarchies and distinctions can be said to be divine, that is, to escape law. But democracy, insofar as it is designed to watch over differences and singularities, cannot. Differences are crucial for democracy. And so, as Derrida holds elsewhere,³⁶ the messiah will *fortunately* not show up.

This leads us to our second conclusion: this permanent exposure to the law —the goal of which, as we have seen, is to guarantee collective and individual rights, and therefore is constitutive of democracy— actually *makes*

34. J. Derrida, «Force of Law: The “Mystical Foundation of Authority”» / «Force de loi: Le “fondement mystique de l'autorité”», *Cardozo Law Review*, vol. 11 (1989-1990), p. 921-973.

35. *Ibid.*, 967.

36. J. Derrida, *Spectres de Marx: l'état de la dette, le travail du deuil et la nouvelle Internationale* (Paris: Galilée, 1993).

citizens vulnerable. Derrida hopes there is no messiah who will bring with him justice, that is, a definitive and homogeneous state, because such state would abolish differences and would thus be terribly oppressive. And yet the situation in which we live now is also that of vulnerability. And what is more: within democracy this vulnerability knows no end. As we have examined, when a state of alarm is declared, citizens are automatically rendered vulnerable. But while said state of alarm is not declared, the possibility of its declaration also threatens citizens because as we have seen the terms for its declaration are not clear-cut. What is supposed to protect citizens renders them vulnerable. Or, more precisely, democracy protects citizens *by* rendering them vulnerable.

Citizens are made vulnerable because democracy is threatened from outside. That is, the underlying motivation of the war on terror —democracy must be preserved from external threats and this justifies the suspension of some laws— is an unavoidable, collateral effect of democracy. The war on terror is, thus, inherent in democracy.

However, as the strike of the Spanish air traffic controllers teaches us, democracy is not only threatened from *outside*, but also, and especially, from *within*. This is our third concluding remark. As a careful reading of the Organic Law 4/1981 has revealed, democracy includes by definition some non-democratic phenomena. It has even been argued that democracy rests upon a non-democratic foundation. As Derrida put forward in *Rogues*, it is in this sense that democracy might be labelled self-immune.³⁷

As long as democracy includes non-democratic practices, *the limits of democracy are blurred*. At some point, it becomes impossible to clearly distinguish the inside from the outside of democracy. The state of alarm declared in 2010 reveals that democracy includes what it tries to excludes, fights against what constitutes it, patrols its limits by moving beyond its limits. Democracy is therefore in an ongoing fight against itself, because it *needs* to be perpetually threatened from *within* in order to take the upper hand when being threatened by forces longing for an *outside*. This is the third lesson that can be drawn from the examination of the case in question.

In our view, the main lesson that can be learned from the examination of the 2010 strike of the air traffic controllers is the result of the articulation of the three concluding remarks we have pointed to: democracy, in order to protect itself from external threats, needs to be threatened from within (conclusive remark 3), and this is done through the permanent possibility of declaring a state of exception, in which citizens are rendered vulnerable by the sus-

37. See Derrida (2003), where he holds that there is a point in democracy which requires a non-democratic decision, hence the aporia it rests upon. J. Derrida, *Voyous: Deux essais sur la raison* (Paris: Galilée, 2003).

pension of some laws (conclusive remark 2), a suspension which nevertheless pertains to the juridical realm (conclusive remark 1).

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